CHEONG WAI KWAN & ANOR v. PENTADBIR TANAH PETALING & ANOR; PENTADBIR HAKMILIK TANAH NEGERI SELANGOR & ANOR (THIRD PARTIES)

HIGH COURT MALAYA, SHAH ALAM
ALICE LOKE YEE CHING JC
[CIVIL SUIT NO: BA-22NCVC-669-12-2016]
4 JANUARY 2021

CIVIL PROCEDURE: *Government proceedings – Satisfaction of orders – Application for certificate under s. 33(1) of Government Proceedings Act 1956 against third parties – Whether prerequisites satisfied – Whether there were legal impediments to issuance of certificate*

CIVIL PROCEDURE: *Stay of execution – Application for – Application for suspension of execution of judgment – Whether plaintiffs would be prejudiced by granting of suspension of payment of certificate issued under s. 33(1) of Government Proceedings Act 1956 – Whether appeal rendered nugatory if amount adjudged paid – Whether there would be difficulty in recovery – Whether expedient to grant suspension of effect of s. 33 certificate – Whether balance of convenience in favour of applicants*

The plaintiffs were the executors of the estate of the deceased, who was the registered owner of a piece of land ('land'). In 2016, the plaintiffs discovered that the second defendant, a developer, had built a condominium on the deceased's land when they wanted to develop the land. The plaintiffs then brought an action for trespass against the second defendant ('original action') as the sole defendant. The second defendant, however, contended that it had purchased the land upon which the condominium was built, from a company, Muafakat Kekal Sdn Bhd, for a consideration of RM9 million. The second defendant then submitted its building plans for the proposed construction of medium-cost flats to Majlis Bandaraya Shah Alam. The development order was issued on condition that part of Lot 453 had to be surrendered to the State Authority. Upon the surrender, a new title for land was issued to the second defendant. The plaintiffs claimed that the second defendant's land overlapped with that of the deceased's land and as such, the second defendant had committed trespass. The second defendant then commenced third party proceedings ('third party action') against the Registrar of Land Titles, State of Selangor and its officers for the issuance of overlapping titles, seeking to be indemnified in respect of any successful claim by the plaintiffs. On the eve of the hearing of the original action and the third party action, the third parties introduced documents claiming that the deceased's land had been acquired sometime in 1986. This prompted the plaintiffs to amend its claim to cite the Land Administrator of Petaling as the

first defendant, and to seek a declaratory relief that the land acquisition exercise undertaken by the first defendant was null and void for non-compliance with the statutory provisions of the Land Acquisition Act 1960. The competing claims of the parties proceeded to trial. At the conclusion of the trial, the High Court Judge found for the plaintiffs in the original action and the second defendant in the third party action. The judgment order comprised the following orders, *inter alia* (i) the land acquisition of the deceased's land was declared to be null and void; (ii) the deceased's land had priority over the land of the second defendant in respect of the overlapped portion; (iii) the second defendant was to pay damages of RM19,378,590 to the plaintiffs with interest at 5% until realisation; and (iv) the second defendant was entitled to be indemnified by the third parties for the amounts adjudged to be paid to the plaintiffs. The parties in these proceedings then filed two notices of applications (i) the plaintiffs' application for a certificate under s. 33(1) of the Government Proceedings Act 1956 against the third parties (encl. 150); and (ii) the first defendant and third parties' application for stay/suspension of the execution of the judgment ('encl. 155'). The first defendant and the third parties had filed an appeal in the Court of Appeal against the judgment which was scheduled for hearing.

Held (allowing encls. 150 & 155)

(1) The prerequisites for the issuance of the s. 33(1) certificate had been satisfied. The plaintiffs had obtained a valid judgment against the officers of the State Government in the third party action. The third parties were adjudged to pay RM19,378,590 directly to the plaintiffs, and twenty-one days have elapsed since 29 October 2018. There was therefore no legal impediment to the issuance of the certificate. However, the proviso to sub-s. 33(3) allows the payment of the amount adjudged payable to be suspended pending an appeal. The question to be considered was whether this court ought to exercise its discretion to direct an order of suspension. (paras 17 & 18)

(2) If the amount adjudged were to be paid to the plaintiffs, it would render the appeal nugatory. The amount would have to be paid out of the consolidated fund of the State, established under the Financial Procedure Act 1957. Under the relevant provisions of the said law, the monies in the fund are public moneys and to be utilised for the benefit of the public. Payment out of the fund ought to be made upon a conclusive decision on appeal by the applicants. Further, the applicants might encounter difficulty in recovering the amount paid in the event of a successful appeal which would in turn prejudice the use to which the amount could have been put to for the benefit of the public. The plaintiffs would not be prejudiced by the stay/suspension as the amount

eventually to be paid would include interest at 5%. On the other hand, if the applicants had to recover the sum paid out, such sum to be returned to the applicants was not subject to interest. The factors aforementioned would tilt the balance of convenience in favour of the applicants. (para 24)

(3) This court ought to grant the suspension of the payment of the certificate issued. The amount of RM19,378,590 with interest at 5% until actual payment was not insubstantial. Whilst an application for stay ought not to be entertained on the mere ground that recovery may be doubtful in the event of a successful appeal, the amount involved was nonetheless a relevant consideration. Whilst there was no evidence adduced as to the possible dissipation of the judgment sum if paid, the likelihood of the applicants being put to some inconvenience in recovering could not be dismissed. Such recovery may well involve expenses and efforts on the part of the applicants. On the other hand, there was no reason to doubt the ability of the State Government (whom the applicants represent) to pay the judgment sum in the event the applicants' appeal was dismissed. (para 25)

(4) The plaintiffs would not be prejudiced by the delay in obtaining the fruits of their litigation in the event the appeal was unsuccessful. They had been awarded interest at the rate of 5% from the judgment sum until realisation. Their interest from being put out of the judgment sum in the interim, was preserved. Having considered the interests of the parties, and the fact that the appeal in the Court of Appeal was to be heard in the not too distant future, it would be expedient to grant a suspension of the effect of the s. 33 certificate. (paras 29 & 30)

Case(s) referred to:

Global Upline Sdn Bhd v. Kerajaan Malaysia [2015] 6 CLJ 497 HC ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 73

Government Proceedings Act 1956, s. 33(1), (3)

For the plaintiff - Vijay Kumar Natarajan & Diana Chee Vun Hsai; M/s Natarajan & Chee

For the 2nd defendant - Krishna V Dallumah; M/s Krishna Dallumah & Indran

For the 1st defendant & 3rd parties - Muhammad Haziq Hashim; State Legal Officer, Selangor

Reported by Suhainah Wahiduddin

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JUDGMENT

Alice Loke Yee Ching JC:

Introduction

[1] The parties in these proceedings have filed two notices of application as follows:

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(i) the plaintiff's application for a certificate under s. 33(1) of the Government Proceedings Act 1956 against the third parties (encl. 150); and

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(ii) the first defendant and third parties' application for stay/suspension of the execution of the judgment dated 29 October 2018 (encl. 155).

Factual Background

[2] To appreciate the legal arguments in support of the applications, the background facts in so far as they are pertinent to the applications are hereinafter set out. The plaintiffs are the executors of the estate of Cheong Weng Sun, the deceased. The deceased was the registered owner of land held under Geran Mukim 210, Lot 953, Batu Tiga, Mukim Damansara, Daerah Petaling, Selangor. He became the registered owner of the said land on 23 July 1964.

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[3] In 2016, the plaintiffs discovered that the second defendant, a developer, had built a condominium on the deceased's land when they wanted to develop the land. The plaintiffs then brought an action for trespass against the second defendant ("original action") as the sole defendant.

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[4] The second defendant however contended that on 10 December 2007, it had purchased the land upon which the condominium was built, from a company known as Muafakat Kekal Sdn Bhd for a consideration of RM9 million. The land it purchased was identified as Lot 453, PN 9398, Seksyen 13, Bandar Shah Alam, Daerah Petaling.

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[5] The second defendant then submitted its building plans for the proposed construction of medium-cost flats to Majlis Bandaraya Shah Alam. A development order was granted on 4 June 2008. The development order was issued on condition that part of Lot 453 had to be surrendered to the State Authority.

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[6] Upon the surrender, a new title for land was issued to the second defendant on 16 April 2014. The second defendant's land was now identified as Lot 91071. The plaintiffs claimed that the second defendant's land overlapped with that of the deceased's land and as such, the second defendant had committed trespass.

I

[7] The second defendant then commenced third party proceedings ("third party action") against the Registrar of Land Titles, State of Selangor and its officers for the issuance of overlapping titles, seeking to be indemnified in respect of any successful claim by the plaintiffs. On the eve of the hearing of the original action and the third party action, counsel for the third parties introduced documents claiming that the deceased's land had been acquired sometime in 1986.

[8] This prompted the plaintiffs to amend its claim to cite the Land Administrator of Petaling as the first defendant, and to seek a declaratory relief that the land acquisition exercise undertaken by the first defendant was null and void for non-compliance with the statutory provisions of the Land Acquisition Act 1960.

[9] The competing claims of the parties proceeded to trial. At the conclusion of the trial, on 29 October 2018, the learned High Court Judge found for the plaintiffs in the original action and the second defendant in the third party action. The judgment order comprised of the following orders:

(i) the land acquisition of the deceased's land was declared to be null and void;

(ii) the deceased's land had priority over the land of the second defendant in respect of the overlapped portion;

(iii) the second defendant was to pay damages of RM19,378,590 to the plaintiffs with interest at 5% until realisation, together with costs of RM100,000;

(iv) the second defendant was entitled to be indemnified by the third parties for the amounts adjudged to be paid to the plaintiffs. In consequence of which, the third parties were to pay the sum of RM19,378,590 with interest at 5% until realisation to the plaintiffs directly, together with costs of RM100,000; and

(v) the third parties were to pay costs of RM20,000 to the second defendant.

The Plaintiffs' Application (Encl. 150)

[10] The plaintiffs, having obtained judgment for the payment of RM19,378,959 which is to be paid to them directly by the third parties now apply for the issuance of a certificate under s. 33(1) of the Government Proceedings Act 1956 ("s. 33 certificate").

[11] Section 33(1) provides:

> Satisfaction of orders against the Government
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> 33. (1) Where in any civil proceedings by or against the Government or in any proceedings under Chapter VIII of the Specific Relief Act 1950, or in any such proceedings as would in England be brought on the Crown

A side of the Queen's Bench Division, or in connection with any arbitration to which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days
B from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

> Provided that, if the court so directs, a separate certificate shall be
C issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the person for the time being named in the record as the advocate for the Government or
D for the Government department or officer concerned.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government shall, subject as hereinafter provided, pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with the interest,
E if any, lawfully due thereon:

> Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended,
F and if the certificate has not been issued may order any such directions to be inserted therein.

(4) Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall
G be individually liable under any order for the payment by the Government or any officer of the Government as such, of any such money or costs.

(5) This section shall apply both in relation to proceedings pending at the commencement of this Act and in relation to proceedings instituted thereafter.

H **[12]** The plaintiffs contend that the statutory requirements for the issuance of the s. 33 certificate in favour of the plaintiffs have been satisfied in that an order must be made against an officer of the Government and that the application is made after the expiration of twenty-one days from the date of the order.

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The Application By The First Defendant And The Third Parties (Enclosure 155)

[13] Whilst the grant of the s. 33(1) certificate was not strenuously opposed by the first defendant and the third parties, they have instead sought for a stay of the execution and/or suspension of the judgment in the original action and the third party action.

[14] The first defendant and the third parties have since filed an appeal in the Court of Appeal against the judgment of 29 October 2018 *vide* notice of appeal dated 26 November 2018. The appeal is now scheduled for hearing on 3 February 2021.

Position Taken By The Second Defendant

[15] The second defendant opposes the stay/suspension application in the light of post-judgment developments that have taken place. The second defendant has now been wound up pursuant to Winding Up Petition No: BA-28NCC-46-01-2019 filed by the plaintiff, and granted by the court on 25 April 2019. A liquidator has also been appointed for the second defendant.

[16] The liquidator's stand in respect of encl. 155 was that the terms of the stay prayed for was wide and may encompass all proceedings taken pursuant to the judgment, including the winding-up proceedings. This would jeopardise the functions of the liquidator, and obstruct the liquidation process.

Decision Of This Court

[17] I agree with the plaintiffs' contention that the prerequisites for the issuance of the s. 33(1) certificate have been satisfied. The plaintiffs have obtained a valid judgment against the officers of the State Government in the third party action. The third parties were adjudged to pay RM19,378,590 directly to the plaintiff, and twenty-one days have elapsed since 29 October 2018. There is therefore no legal impediment to the issuance of the certificate.

[18] However, the proviso to sub-s. 33(3) allows the payment of the amount adjudged payable to be suspended pending an appeal. The question to be considered then is whether this court ought to exercise its discretion to direct an order of suspension.

[19] The applicants in encl. 155 referred to the case of *Global Upline Sdn Bhd v. Kerajaan Malaysia* [2015] 6 CLJ 497 where the High Court was urged to hold that the criteria for suspension was less stringent than the criteria for a stay of execution. The High Court had this to say in response:

A [34] Before venturing any further, I shall deal with the point that was made by the learned Federal Counsel who stated that the proviso to s. 33(3) GPA is a special provision and is not to be equated with a stay of execution which falls under the general provision which is encapsulated by the omnibus provision in s. 30 of the GPA which was referred to in the earlier part of this judgment.

B [35] In my view, the question as to whether the proviso to s. 33(3) GPA is a special provision only serves to obfuscate the true question which is to ascertain the purpose and function of the proviso. To my mind, the answer to the question is not so elusive or incapable of ascertainment.

C [36] If s. 33(3) GPA is read as a whole then it will be implicitly obvious that the true purpose of the proviso is or must necessarily be to enable the defendant to seek the aid of the court to suspend any payment of the judgment debt which is pending appeal as there may or could be circumstances where it is necessary that pending disposal of the Government's appeal, the judgment debt should not be paid to the D judgment creditor.

[37] In this regard, there may be a range of reasons or circumstances why a judgment debt against the defendant should be suspended. There could for instance, be public interest reasons or inter-governmental relationship or Federal/State Government relationships or arrangements that may be impacted and which would have to be considered.

E [38] At the other extreme of this range would be the impecuniosity of the plaintiff and the resultant inability of the defendant to recoup and recover the amounts paid over to the plaintiff in the event the defendant's appeal is successful and restitution is ordered. But this would be more akin to an argument that will usually be taken in the context of an application for F stay of execution ("special circumstances").

[39] Needless to say, the categories are never closed and the list is by no means exhaustive. However, I have no doubt that whatever that is being advanced as a reason for the suspension, must necessarily have at least two attributes.

G [40] First, the reason that is advanced by the defendant should be credible and not specious or contrived. Secondly, it must be on affidavit. Most certainly it should not be asserted from the Bar. Finally, it should not be "plucked from the air".

[41] As such, if there is a credible reason or basis to suspend the judgment H debt then the court should generally lean in favour of exercising the statutory discretion under the proviso to s. 33(3) to preclude the judgment creditor from taking any steps as may entitle them to realise the judgment sum.

[42] I would go so far as to say that if there is any doubt on the matter I and the evidence is resting in the middle, then the balance should tilt in favour of the defendant or the benefit of doubt be given to the defendant and for the judgment debt to be suspended accordingly.

[43] Of course, the circumstances may vary from case to case and it is tempting to conclude that the circumstance must amount to special circumstances of the type that is envisaged when a party is applying for stay of execution in the ordinary way.

[44] However, it appears to me that the proviso to s. 33(3) GPA is "*sui generis*" and is a somewhat specific statutory provision. As such, I should refrain from conflating and/or equating the criteria for suspension of a judgment debt under the proviso to s. 33(3) GPA with the criteria necessary to obtain a stay of execution.

[45] Whether the criteria to obtain a suspension of a judgment debt under the proviso to s. 33(3) GPA should be more or less stringent than the criteria for stay of execution is an open question. However, it is my view that at the very least, there should be some circumstances shown by the party seeking a suspension, which would qualify as a criteria under the proviso to s. 33(3) GPA.

[46] Of course, if special circumstances are shown, then I cannot see how a court can refuse to grant a suspension of the judgment debt. However, what is inescapable is that the applicant must show (on affidavit) some fact or circumstances or reason why the judgment debt should be suspended pending the disposal of the appeal.

[20] Whilst the question whether the threshold for grant of an order for suspension is lower than a stay was left open, the learned judge categorically stated that there must be evidence for the court to consider whether the statutory discretion ought to be exercised. I hold the same view.

[21] The suspension would operate as a stay since it has the same effect as the grant of a stay. Hence, the consideration for the grant of suspension must invariably take into account the general principles applicable to a stay. To argue that different considerations and criteria apply would be to make a distinction between the Government applying for a suspension under s. 33(3) and an ordinary litigant applying for a stay of execution. In any event, I doubt if any useful purpose would be served by drawing a distinction on the criteria for a stay or suspension under s. 33(3). The categories when a stay of execution may be granted, as decided by case laws, are not exhaustive and it is for the applicant to satisfy the court that reasons exist for a stay to be given. To my mind, the same requirements apply equally to the Government in an application for a suspension in sub-s. 33(3).

[22] The principles for the grant of stay is trite. An appeal does not operate as an automatic stay, unless the court so orders. This principle is embodied statutorily in s. 73 of the Courts of Judicature Act 1964 (see also: *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbaguna Makmur Bhd* [2003] 4 CLJ 1; [2004] 1 MLJ 257). The discretion to grant a stay lies with the court, bearing in mind that a successful party ought not to be deprived of the fruits of his litigation.

[23] The principles governing stay of execution have also been succinctly enunciated in the Federal Court decision of *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1. The overriding consideration is that special circumstances must be shown to warrant the grant of a stay. Augustine Paul FCJ has this to say:

> The need to establish the existence of special circumstances to enable the court to grant a stay of execution has been well-established in this country (see, for example, the Federal Court cases of *Re Kong Thai Sawmill (Miri) Sdn Bhd, Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131; *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 MLJ 105 *and Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 2 MLJ 119). There are numerous other cases which have adopted this test (see, for example, *Leong Poh Shoe v. Ng Kat Chong* [1966] 1 MLJ 86; *Ajaib Singh v. Jeffrey Fernandez* [1971] 139; *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406; *Matang Holdings Bhd & Ors v. Dato' Lee San Choon & Ors* [1985] 2 MLJ 406; *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd* [1989] 3 MLJ 40 and *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussain & Anor* [1995] 3 MLJ 224 ...
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> The resultant matter for determination are the factors or reasons that may constitute special circumstances. Generally stated, they are circumstances which go to the enforcement of the judgment (see *Sarwari a/p Ainuddin v. Abdul Aziz a/l Ainuddin* [2000] 5 MLJ 391) ...
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> In *Rosengrens Ltd v. Safe Deposit Centres Ltd* (unreported, 19 July 1984, CA, Lexis Nexis) Dillon LJ said:
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> > The most common special circumstance is, normally no doubt, that it would be doubtful whether, if the judgment was enforced, the defendant would get his money back if the appeal subsequently succeeded. But there are others as, for instance, if there is a likelihood that the money the subject of the judgment, if paid over, would go to a foreign jurisdiction where the defendant would have difficulty recovering it.
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> > The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. The reasons must relate to the enforcement of the judgment. They must be deposed in the affidavit filed in support of the application (see *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406) ...

[24] I now come to the merits of the application in encl. 155. The affidavit filed in support of encl. 155 states that if the amount adjudged were to be paid to the plaintiffs, it would render the appeal nugatory. The amount would have to be paid out of the consolidated fund of the State, established under the Financial Procedure Act 1957. Under the relevant provisions of the said law, monies in the fund are public moneys and to be utilised for the benefit of the public. It was further averred on affidavit that payment out of the fund

ought to be made upon a conclusive decision on appeal by the applicants. Further, the applicants might encounter difficulty in recovering the amount paid in the event of a successful appeal which would in turn prejudice the use to which the amount could have been put to for the benefit of the public. The plaintiffs would not be prejudiced by the stay/suspension as the amount eventually to be paid would include interest at 5%. On the other hand, if the applicants have to recover the sum paid out, such sum to be returned to the applicants is not subject to interest. Finally, the factors aforementioned would tilt the balance of convenience in favour of the applicants.

[25] Having considered the circumstances of this case, I am of the view that I ought to grant the suspension of the payment of the certificate issued. The amount of RM19,378,590 with interest at 5% until actual payment is not insubstantial. Whilst I am mindful of the fact that an application for stay ought not to be entertained on the mere ground that recovery may be doubtful in the event of a successful appeal, the amount involved is nonetheless a relevant consideration. Whilst there is no evidence adduced as to the possible dissipation of the judgment sum if paid, the likelihood of the applicants being put to some inconvenience in recovering cannot be dismissed. Such recovery may well involve expense and effort on the part of the applicants. On the other hand, there is no reason to doubt the ability of the State Government (whom the applicants represent) to pay the judgment sum in the event the applicants' appeal is dismissed.

[26] The public interest consideration that the applicants have urged this court to consider is relevant also. The judgment sum would be paid out of the consolidated fund of the Selangor State, which finances Government expenditure which *inter alia*, includes financing for public benefit.

[27] I would however, regard the fact that the appeal is scheduled for hearing on 3 February 2021 as a more compelling reason to grant a suspension. The hearing date is but a mere four months away. The length of time taken in litigation process has been far longer in duration. Although the deceased became the registered owner of the land in question in 1964, it was not until 2016 that the discovery of overlapping of land titles was discovered, causing the plaintiffs to institute litigation.

[28] The plaintiffs obtained judgment in October 2018. It was only in June 2020 that the application for the s. 33(1) certificate was made. The plaintiffs have waited this length of time to enforce the judgment. Whilst this is not a fact which is to be held against the plaintiffs, it is at least indicative of the restraint the plaintiffs have exercised thus far from enforcing payment of the judgment sum.

[29] The plaintiffs will not be prejudiced by the delay in obtaining the fruits of their litigation in the event the appeal is unsuccessful. They have been awarded interest at the rate of 5% from the judgment sum until realisation. Their interest from being put out of the judgment sum in the interim, is preserved.

[30] Having considered the interests of parties, and the fact that the appeal in the Court of Appeal is to be heard in the not too distant future, it would be expedient to grant a suspension of the effect of the s. 33 certificate.

[31] As for the second defendant, the suspension granted will not affect the proceedings taken in winding up. Its concerns were unjustified.

Conclusion

[32] Based on the foregoing reasons, I therefore allow encls. 150 and 155. However, the grant of encl. 150 is subject to the proviso of sub-s. 33(3), and directions to suspend the payment of the whole amount in the certificate be inserted therein. I make no order as to the costs of the applications in both the enclosures.